

FCC MAIL SECTION

Federal Communications Commission

FCC 99-199

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Before the
Federal Communications Commission
015 Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Global NAPs, Inc. Petition for |) | CC Docket No. 99-154 |
| Preemption of Jurisdiction of the |) | |
| New Jersey Board of Public Utilities |) | |
| Regarding Interconnection Dispute with |) | |
| Bell Atlantic-New Jersey, Inc. |) | |

MEMORANDUM OPINION AND ORDER

Adopted: August 3, 1999

Released: August 3, 1999

By the Commission:

I. INTRODUCTION

1. This *Memorandum Opinion and Order* addresses the petition of Global NAPs, Inc. (GNAPs) for preemption of jurisdiction of the New Jersey Board of Public Utilities (New Jersey Board) with respect to an arbitration proceeding involving GNAPs and Bell Atlantic-New Jersey, Inc. (Bell Atlantic).¹ The Commission placed GNAPs' preemption petition on public notice on May 7, 1999.² Ameritech, AT&T Corp., Bell Atlantic, MCI WorldCom, Inc., and the New Jersey Board filed comments, and GNAPs and the New Jersey Division of the Ratepayer Advocate filed replies.

2. GNAPs seeks preemption of the New Jersey Board pursuant to section 252(e)(5) of the Communications Act of 1934, as amended.³ Section 252(e)(5) authorizes the Commission to preempt a state commission in any proceeding or matter in which the state commission "fails

¹ Global NAPs, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities, CC Docket No. 99-154, filed with the Commission May 5, 1999 (New Jersey Petition).

² *Pleading Cycle Established for Comments on Global NAPs South, Inc. Petition for Preemption of Jurisdiction of the New Jersey Board of Public Utilities Pursuant to Section 252(e)(5) of the Communications Act*, Public Notice, CC Docket No. 99-154, DA 99-884 (rel. May 7, 1999) (Public Notice). The Public Notice established a deadline for comment of May 24, 1999, and a deadline for reply comments of June 3, 1999. The New Jersey Board and GNAPs also filed supplemental comments and Bell Atlantic also filed a supplemental reply.

³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), *codified at* 47 U.S.C. §§ 151 *et seq.* Hereafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Communications Act" or "the Act."

to act to carry out its responsibility” under section 252.⁴ Section 252 sets out the procedures by which telecommunications carriers may request and obtain interconnection, resale services or unbundled network elements from an incumbent local exchange carrier (LEC).⁵ For the reasons discussed below, we find that in light of action by the New Jersey Board subsequent to GNAPs filing its petition, Commission preemption of jurisdiction pursuant to section 252(e)(5) is unwarranted.⁶ We therefore deny GNAPs’ petition and do not preempt the New Jersey Board.

II. BACKGROUND

A. Statutory Provisions

3. Congress adopted sections 251 and 252 of the 1996 Act to foster local exchange competition by imposing certain requirements on incumbent LECs that are designed to facilitate the entry of competing telecommunications carriers. Section 251 describes the various requirements designed to promote market entry, including incumbent LECs’ obligations to provide requesting telecommunications carriers interconnection, unbundled network elements, and services for resale.⁷ Section 252 sets forth the procedures by which telecommunications carriers may request and obtain interconnection, unbundled network elements, and services for resale from an incumbent LEC pursuant to section 251.⁸ Specifically, sections 252(a) and (b) establish a scheme whereby telecommunications carriers may obtain interconnection with the incumbent according to agreements fashioned through (1) voluntary negotiations between the carriers, (2) mediation by state commissions, or (3) arbitration by state commissions.⁹ These interconnection agreements must then be submitted for approval to the appropriate state

⁴ 47 U.S.C. § 252(e)(5).

⁵ See generally 47 U.S.C. § 252.

⁶ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16122-16132 (1996) (*Local Competition Order*), *aff’d in part and vacated in part sub nom., Competitive Telecommunications Ass’n v. FCC*, 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utilities Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *petition for cert. granted*, Nos. 97-829, 97-830, 97-831, 97-1097, 97-1099, and 97-1141 (U.S. Jan. 26, 1998) (collectively *Iowa Utils. Bd. v. FCC*), *aff’d in part and remanded, AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721 (1999); Order on Reconsideration, 11 FCC Rcd 13042 (1996), Second Order on Reconsideration, 11 FCC Rcd 19738 (1996); Third Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 97-295 (rel. Aug. 18, 1997), *further recons. pending*; see also 47 C.F.R. §§ 51.801(b), 51.803(b).

⁷ See generally 47 U.S.C. § 251(c). For purposes of this order, the interconnection, access to unbundled elements, services for resale and other items for which incumbent LECs have a duty to negotiate pursuant to section 251(c)(1) are sometimes referred to collectively as “interconnection.”

⁸ See generally 47 U.S.C. § 252.

⁹ See 47 U.S.C. § 252(a), (b).

commission.¹⁰

4. In addition, section 252(i) provides another means for establishing interconnection. Pursuant to section 252(i), local exchange carriers must “make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.”¹¹ Negotiation is not required to implement a section 252(i) opt-in arrangement; indeed, neither party may alter the terms of the underlying agreement. Although there is no arbitration or negotiation as identified in section 252(e)(1) for the state to approve,¹² states may adopt “procedures for making agreements available to requesting carriers on an expedited basis.”¹³ As the Commission observed three years ago, a party seeking interconnection pursuant to section 252(i) “need not make such requests pursuant to the procedures for initial section 251 requests, but shall be permitted to obtain its statutory rights on an expedited basis.”¹⁴ Otherwise, the “non-discriminatory, pro-competition purpose of section 252(i) would be defeated were requesting carriers required to undergo a lengthy negotiation and approval process pursuant to section 251.”¹⁵

5. Section 252(e)(5) directs the Commission to assume responsibility for any proceeding in which the state commission “fails to act to carry out its responsibility” under section 252:

(5) COMMISSION TO ACT IF STATE WILL NOT ACT.—If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect

¹⁰ 47 U.S.C. § 252(e)(1).

¹¹ 47 U.S.C. § 252(i). Rule 51.809(a) specifies that the incumbent shall make available provisions of an agreement “without unreasonable delay.” 47 C.F.R. § 51.809(a).

¹² 47 U.S.C. § 252(e)(1) (“Any interconnection agreement adopted by negotiation or arbitration shall be submitted to the State commission”); *see also Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321 (indicating that carriers “seeking interconnection, network elements, or services pursuant to section 252(i) need not make such requests pursuant to the procedures for initial section 252 requests”).

¹³ *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321.

¹⁴ *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321. An expedited process for section 252(i) opt-ins would necessarily be substantially quicker than the time frame for negotiation, and approval, of a new interconnection agreement since the underlying agreement has already been subject to state review under section 252(e).

¹⁵ *Id.*

to the proceeding or matter and act for the State commission.¹⁶

B. Commission's Rules

6. The *Local Competition Order* adopted "interim procedures" to exercise preemption authority under section 252(e)(5) in order to "provide for an efficient and fair transition from state jurisdiction should [the Commission] have to assume the responsibility of the state commission"¹⁷ The *Local Competition Order* concluded that the Commission would not take an "expansive view" of what constitutes a state commission's "failure to act" for purposes of section 252(e)(5).¹⁸ Rather, the *Local Competition Order* interpreted "failure to act" to mean a state's failure to complete its duties in a timely manner. The *Local Competition Order* limited the instances under which Commission preemption pursuant to section 252(e)(5) is appropriate to "when a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C)."¹⁹ Under the Commission's rules, "[t]he party seeking preemption [pursuant to section 252(e)(5)] must prove that the state [commission] has failed to act to carry out its responsibilities under section 252 of the Act."²⁰

C. Procedural History

7. On January 26, 1998, GNAPs asked Bell Atlantic to commence negotiations for interconnection.²¹ The parties subsequently attempted to negotiate the terms of an interconnection agreement.²² On June 30, 1998, following unsuccessful negotiations with Bell

¹⁶ 47 U.S.C. § 252(e)(5).

¹⁷ *Local Competition Order*, 11 FCC Rcd at 16127, ¶ 1283.

¹⁸ *Id.* at 16128, ¶ 1285.

¹⁹ *Id.* at 16128, ¶ 1285. See also 47 C.F.R. § 51.801(b); *In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, Order, 13 FCC Rcd 1755, 1758-1759, ¶ 5 (1997), *recon. denied*, CC Docket Nos. 97-163, 97-164, 97-165, FCC 99-71 (rel. Apr. 13, 1999). The Commission has indicated that there is no "failure to act" when an interconnection agreement is "deemed approved" under section 252(e)(4) as a result of state commission inaction. *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; 47 U.S.C. § 252(e)(4).

²⁰ 47 C.F.R. § 51.803(b); see also *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285.

²¹ Global NAPs, Inc. Petition for Arbitration of Interconnection Rates, Terms, Conditions and related Arrangements with Bell Atlantic, Docket No. TO98070426 (filed with New Jersey Board Jul. 1, 1998) at 2 (Arbitration Petition) (ex parte filing July 28, 1999).

²² New Jersey Petition at 1-2.

Atlantic, GNAPs filed a timely petition for arbitration with the New Jersey Board, pursuant to section 252(b) of the Act.²³

8. In August 1998, GNAPs concluded that it could meet its interconnection needs by opting-into a 1996 agreement between Bell Atlantic and MFS Intelenet (MFS), pursuant to section 252(i).²⁴ As a result, GNAPs advised Bell Atlantic that GNAPs wanted to interconnect with Bell Atlantic on the same terms as contained in Bell Atlantic's 1996 agreement with MFS (1996 MFS Agreement).²⁵ According to GNAPs, Bell Atlantic refused to honor GNAPs' right to opt-into the 1996 MFS Agreement without modifications.²⁶

9. On September 28, 1998, GNAPs and Bell Atlantic filed a joint statement of issues with the arbitrator selected by the New Jersey Board.²⁷ On October 19, 1998, the arbitrator held

²³ See Arbitration Petition.

²⁴ New Jersey Petition at 1. Section 252(i) provides that: "[a] local exchange carrier shall make available any interconnection service, or network element provided under an agreement approved under [section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i). At the time GNAPs first sought to interconnect with Bell Atlantic, carriers were subject to the Eighth Circuit's interpretation of section 252(i). As a result, requesting carriers such as GNAPs were required to opt-into an existing contract as a whole rather than "pick and choose" different elements from different existing contracts. *Iowa Utils. Bd.*, 120 F.3d at 800-801. The Supreme Court has since overturned the Eighth Circuit's interpretation of section 252(i) and reinstated the Commission's "pick and choose" approach. *AT&T Corp.*, 119 S.Ct. at 738; see generally 47 C.F.R. § 51.809.

²⁵ New Jersey Petition at 1-2. The procedural history of this proceeding is complex because it involves both opt-in and arbitration attempts by GNAPs. GNAPs should have been able to exercise its opt-in right under section 252(i) on an expedited basis. *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321. Thus, for example, a carrier should be able to notify the local exchange carrier that it is exercising this right by submitting a letter to the local exchange carrier identifying the agreement (or the portions of an agreement) it will be using and to whom invoices, notices regarding the agreement, and other communications should be sent. In such circumstances, the carrier opting-into an existing agreement takes all the terms and conditions of that agreement (or the portions of that agreement), including its original expiration date. It appears from the record that one of the disputes between the parties was over the termination date of the agreement being opted-into. This dispute underscores the importance of contractual terms that unambiguously establish a termination date.

²⁶ New Jersey Petition at 2. If a local exchange carrier fails to recognize the rights of an opting-in carrier, that carrier may seek expedited relief from this Commission pursuant to section 208. *Local Competition Order*, 11 FCC Rcd at 16141, ¶ 1321; 47 U.S.C. § 208. In this case, GNAPs continued to pursue arbitration pursuant to section 252(b) and during the arbitration proceeding that followed, sought to enter into an interconnection agreement with Bell Atlantic identical to the 1996 MFS Agreement. Bell Atlantic asserts in this proceeding that GNAPs has no right to opt-into provisions relating to reciprocal compensation, arguing that section 252(i) only permits carriers to opt-into provisions of interconnection agreements that are based on the requirements of section 251. Bell Atlantic Comments at 4. We reject Bell Atlantic's argument, as our rules establish only two limited exceptions to the right of carriers to opt-into an interconnection agreement. See 47 C.F.R. § 51.809(b).

²⁷ *In the Matter of the Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arguments with Bell Atlantic-New Jersey Pursuant to Section 252(b) of the*

a conference call with the parties.²⁸ On October 20, 1998, at the request of the arbitrator, each party submitted its own revised statement of issues to be resolved by arbitration.²⁹ On October 21, 1998, a hearing was held during which the parties were given the opportunity to present witnesses and make opening and closing arguments.³⁰ On October 23, 1998, both GNAPs and Bell Atlantic filed post hearing briefs.³¹

10. On October 26, 1998, the arbitrator issued a recommended interim decision. Under the rules of the New Jersey Board, GNAPs and Bell Atlantic had five business days following the arbitrator's decision to enter into an interconnection agreement implementing the arbitrator's decision and submit the same to the New Jersey Board for review.³² Thus, on November 1, 1998, an executed GNAPs/Bell Atlantic interconnection agreement was due with the New Jersey Board. Neither party filed an interconnection agreement on this date.

11. On November 4, 1998, Mark W. Musser, Secretary of the New Jersey Board, sent a letter to both GNAPs and Bell Atlantic, advising the parties that "the formal signed arbitration agreement shall be filed before the close of business on Thursday, November 5, 1998."³³ On November 5, 1998, Bell Atlantic filed a letter with the New Jersey Board explaining the failure of the parties to file an interconnection agreement.³⁴ On November 5, 1998, GNAPs also filed a letter with the New Jersey Board describing the inability of the parties to file a signed interconnection agreement.³⁵ On November 10, 1998, Bell Atlantic filed a letter with the New Jersey Board responding to GNAPs' November 5, 1998 letter.³⁶ On November 12, 1998, GNAPs

Telecommunications Act of 1996, Recommended Interim Final Decision of the Arbitrator, Docket No. TO98070426 (New Jersey Board Oct. 26, 1998) at 1 (Recommended Decision) (filed as an attachment to New Jersey Petition).

²⁸ Letter from Robert A. Lewis, Counsel, Bell Atlantic to Ashley C. Brown, Arbitrator, New Jersey Board (Oct. 20, 1998) (filed as an attachment to New Jersey Petition).

²⁹ *Id.*; Letter from Christopher W. Savage, Counsel, GNAPs to Ashley C. Brown, Arbitrator, New Jersey Board (Oct. 20, 1998) (filed as an attachment to New Jersey Petition).

³⁰ Recommended Decision at 1.

³¹ *Id.*

³² New Jersey Petition at 2-3; New Jersey Board Comments at 1. *See generally* 47 U.S.C. § 252(e)(1).

³³ Letter from Mark W. Musser, Secretary, New Jersey Board to Barry S. Abrams, Counsel, Bell Atlantic and Christopher W. Savage, Counsel, GNAPs (Nov. 4, 1998) (filed as an attachment to New Jersey Petition).

³⁴ Letter from Barry S. Abrams, Counsel, Bell Atlantic to Mark W. Musser, Secretary, New Jersey Board (Nov. 10, 1998) (filed as an attachment to New Jersey Petition).

³⁵ *Id.*

³⁶ *Id.*

filed a letter in response to Bell Atlantic's November 10, 1998 letter, along with GNAPs' "corrected" version of a November 2, 1998 interconnection agreement proposed by Bell Atlantic.³⁷ In these letters, the parties disputed the impact of the Commission's October 30, 1998 *GTE ADSL Order*³⁸ and the statements therein regarding reciprocal compensation for ISP traffic, on the implementation of the arbitrator's decision in an interconnection agreement.

12. On July 12, 1999, the New Jersey Board released a final order completing the GNAPs/Bell Atlantic arbitration proceeding.³⁹ The New Jersey Board adopted the arbitrator's October 26, 1998 recommended decision with several modifications and ordered the parties to submit an executed interconnection agreement implementing their decision within five days. On July 19, 1999, GNAPs and Bell Atlantic submitted an executed agreement to the New Jersey Board incorporating the conclusions in the July 12, 1999 final order.⁴⁰ On July 26, 1999, the New Jersey Board approved GNAPs and Bell Atlantic's interconnection agreement.⁴¹

D. GNAPs' Petition for Preemption of Jurisdiction

13. GNAPs requests in its petition that the Commission "preempt the jurisdiction" of the arbitration proceeding it requested before the New Jersey Board because "the state has failed to carry out its responsibilities under section 252 of the Act."⁴² Citing the Commission's *MCI Preemption Order*, GNAPs notes that state commissions have a duty under sections 252(b)(4)(C) and 252(c)(3) "to ensure that they do not forestall the completion of interconnection negotiations by failing to resolve all the issues clearly presented to them in a timely manner."⁴³ GNAPs

³⁷ Letter from Christopher W. Savage, Counsel, GNAPs to Mark W. Musser, Secretary, New Jersey Board (Nov. 12, 1998) (filed as an attachment to New Jersey Petition).

³⁸ *GTE Telephone, GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, CC Docket No. 98-79, FCC 98-292 (rel. Oct. 30, 1998) (*GTE ADSL Order*).

³⁹ *In the Matter of the Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arguments with Bell Atlantic-New Jersey Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Final Order, Docket No. TO98070426 (New Jersey Board July 12, 1999) (filed as an attachment to New Jersey Board Supplemental Comments).

⁴⁰ Letter from Barry S. Abrams, Counsel, Bell Atlantic to Mark W. Musser, Secretary, New Jersey Board (July 19, 1999) (ex parte filing July 28, 1999).

⁴¹ *In the Matter of the Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, Conditions and Related Arguments with Bell-Atlantic New Jersey Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Decision and Order, Docket No. TO98070426 (New Jersey Board July 26, 1999) (ex parte filing July 28, 1999).

⁴² New Jersey Petition at 1, 5.

⁴³ *Id.* at 4 (citing *In the Matter of Petition of MCI for Preemption Pursuant to Section 252(e)(5) of the*

suggests that the New Jersey Board has ignored this duty because it has “simply failed to issue any order” in the GNAPs/Bell Atlantic arbitration proceeding since the arbitrator’s recommended decision last fall.⁴⁴ Moreover, GNAPs argues that it “is long since entitled to *some* interconnection contract with Bell Atlantic in New Jersey on *some* terms that comply with the Act.”⁴⁵ As a result of what GNAPs characterizes as the New Jersey Board’s “inexplicable failure to act,” GNAPs maintains that it has been excluded from the New Jersey local telecommunications market.⁴⁶

14. In addition, GNAPs requests that the Commission recognize that “everything in this case that needs to be done has already been done,” except for the issuance of “a legally binding order from a regulator directing Bell Atlantic to comply” with the arbitrator’s decision.⁴⁷ Thus, GNAPs argues that the Commission should both preempt the jurisdiction of the New Jersey Board and immediately enter an order directing Bell Atlantic to sign an agreement that complies with the terms of the arbitrator’s October 26, 1998 decision.⁴⁸

III. DISCUSSION

15. Section 252(e)(5) directs the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which a state commission “fails to act to carry out its responsibility under [section 252].”⁴⁹ As noted above, in the *Local Competition Order*, the Commission determined that it would preempt a state commission’s jurisdiction for “failure to act” under section 252(e)(5) only in those “instances where a state commission fails to respond, within a reasonable time, to a request for mediation or arbitration, or fails to complete arbitration within the time limits of section 252(b)(4)(C).”⁵⁰ Thus, under the Commission’s current rules, a state commission “fails to act” when it fails to resolve the outstanding issues in an arbitration proceeding within the nine month time limit in section 252(b)(4)(C).

Telecommunications Act of 1996, Memorandum Opinion and Order, 12 FCC Rcd 15594 (1997) (*MCI Preemption Order*)).

⁴⁴ New Jersey Petition at 3-4.

⁴⁵ *Id.* at 5.

⁴⁶ *Id.* at 4.

⁴⁷ *Id.* at 5-6.

⁴⁸ *Id.* at 6.

⁴⁹ 47 U.S.C. § 252(e)(5).

⁵⁰ 47 C.F.R. § 51.801(b). See also *Local Competition Order*, 11 FCC Rcd at 16128, ¶ 1285; Bell Atlantic Comments at 3.

16. We observe at the outset that the New Jersey Board responded to GNAPs' request for arbitration by quickly initiating proceedings. On October 26, 1998—within the nine month time limit of section 252(b)(4)(C)—the arbitrator issued a recommended decision. Moreover, although the New Jersey Board's arbitration guidelines require the parties to submit an interconnection agreement incorporating the arbitrator's decision within five days, neither party filed such an agreement. Instead, the parties chose to file a new round of pleadings in response to our October 30, 1998 *GTE ADSL Order*. Although the arbitrator's recommended decision was timely, the New Jersey Board did not take final action to resolve this matter until July 12, 1999, well beyond the nine month arbitration deadline.

17. Even though the New Jersey Board "failed to act" within the nine month deadline imposed by section 252, we are now presented with a situation in which GNAPs has asked the Commission to assume jurisdiction over an already completed state proceeding. The New Jersey Board's recent action has effectively mooted the need for Commission preemption of the New Jersey GNAPs/Bell Atlantic proceeding. While we have a duty to assume "responsibility" when a state commission "fails to act," after the New Jersey Board's July 12, 1999 final order, there is no further "responsibility" left for the Commission to assume. Principles of federal-state comity and efficiency lead us to question the merit of assuming jurisdiction over the completed state proceeding under the circumstances presented in this instance. This situation is roughly analogous to one in which a court declines to act on a matter pending resolution of proceedings before an administrative agency. "[P]ractical notions of judicial efficiency" have "a role to play when a court is confronted with a case the resolution of which could benefit from the prior conclusion of a related administrative proceeding."⁵¹ Just as a court must recognize existing agency action that will "render the complex fact pattern simple, or the lengthy proceeding short[,]," we recognize the practical efficiency of acknowledging the New Jersey Board's recent resolution of this proceeding.⁵² In doing so, we avoid a "situation[] which cr[ies] out for the elimination of duplication of efforts."⁵³ We note, however, that our decision is based on the particular circumstances in this instance.

18. Section 252(e)(5) also suggests that the Commission should avoid assuming jurisdiction over a completed state proceeding. Section 252(e)(5) directs the Commission to take jurisdiction within 90 days after being notified of a state commission's failure to act. We believe a plausible interpretation of this provision is that the 90 day period following the filing of a preemption petition was intended, at least in part, to put the state on notice that unless the state commission completes its proceeding, the Commission will preempt the state's authority. When state action is fully completed within this notification period, we find it hard to conclude that

⁵¹ *Rohr Industries, Inc. v. Washington Metropolitan Transit Authority*, 720 F.2d 1319, 1325 (D.C. Cir. 1983).

⁵² *Id.*

⁵³ *Id.*

Congress, nevertheless, intended that we must assume jurisdiction, which would have the effect of delaying resolution of the proceeding rather than expediting it. Such a result would seem at odds with the intent of this provision to provide a mechanism to ensure prompt resolution of these disputes. In the instant proceeding, once the New Jersey Board was put on notice that Commission preemption for "failure to act" under Commission rules implementing section 252(e)(5) was imminent, the New Jersey Board completed the GNAPs/Bell Atlantic arbitration proceeding.

19. In sum, we believe that further action by this Commission assuming jurisdiction over the already completed New Jersey GNAPs/Bell Atlantic arbitration proceeding is unwarranted under these circumstances. Thus, we deny GNAPs' petition and do not preempt the New Jersey Board. Because we do not preempt the jurisdiction of the New Jersey Board, we deny GNAPs' request that the Commission issue an order directing Bell Atlantic to sign an agreement that complies with the terms of the arbitrator's October 26, 1998 decision.

20. Finally, we note that the Commission's decision not to preempt the jurisdiction of the New Jersey Board does not leave GNAPs without a remedy. While GNAPs may prefer to attack the validity of the New Jersey Board's final order before this agency, we will not examine the substantive merits of that decision here.⁵⁴ Pursuant to section 252(e)(6), a party aggrieved by a state commission arbitration determination under section 252 has the right to bring an action in federal district court.⁵⁵ Thus, GNAPs may still challenge the final New Jersey Board determination in federal district court pursuant to section 252(e)(6). We note in conclusion, however, that in the future we expect incumbent carriers to make the terms of previously approved agreements available to other carriers pursuant to section 252(i) on an expedited basis.

IV. CONCLUSION

21. For the foregoing reasons, we deny GNAPs' petition for Commission preemption of jurisdiction of GNAPs' arbitration proceeding with Bell Atlantic in New Jersey.

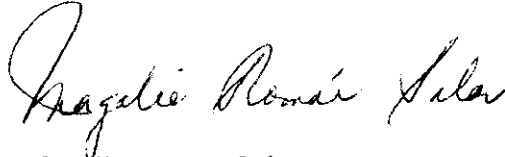
⁵⁴ In supplemental comments GNAPs argued that the New Jersey Board misunderstood and misapplied the Commission's February 26, 1999 *ISP Compensation Ruling and NPRM*. GNAPs Supplemental Comments at 2-6; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68 (rel. Feb. 26, 1999) (*ISP Compensation Ruling and NPRM*). Cf. *In the Matter of Petition for Commission Assumption of Jurisdiction of Low Tech Designs, Inc.'s Petition for Arbitration with Ameritech Illinois Before the Illinois Commerce Commission, with BellSouth Before the Georgia Public Service Commission, and with GTE South Before the Public Service Commission of South Carolina*, 13 FCC Rcd 1755, 1758-1759 (1997) (holding that there is no basis to examine the substantive validity of the state commission's decision under the Commission's rules even when petitioner argues that there was a failure to act because the state commission erroneously applied the law in rendering its decision).

⁵⁵ 47 U.S.C. § 252(e)(6); *Local Competition Order*, 11 FCC Rcd 15563, ¶ 124; Bell Atlantic Comments at 2.

VI. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED that, pursuant to section 252 of the Communications Act of 1934, as amended, and section 51.801(b) of the Commission's rules, 47 U.S.C. § 252 and 47 C.F.R. § 51.801(b), the petition for Commission preemption of jurisdiction filed by Global NAPs, Inc. on May 5, 1999 is DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary